TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~382.~~ 169

HENRY S. BULKLEY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 4, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 382.

HENRY S. BULKLEY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed July* 11, 1870.

U. S. Court of Claims.

HENRY S. BULKLEY
vs.
THE UNITED STATES. } No. 6189.

To the honorable Court of Claims:

The petition of Henry S. Bulkley, a citizen of the United States, respectfully represents:

That in the month of March, A. D. 1865, he entered into a written contract with Col. J. A. Potter, a quartermaster, acting for and on behalf of the United States, for the transportation of Government stores upon route No. one, west of the Missouri River. A copy of this contract and of the tabular statement referred to in it is hereto annexed and marked "Exhibit A," and claimant prays may be considered and read as part of this petition.

And petitioner further shows that on or about June 27th, 1865, the said contract, agreeably to Art. 15, was changed as follows, to wit: The condition incorporated in Art. XI, limiting the amount to be transported under it was abrogated. and in lieu thereof it was agreed by and between petitioner and Col. J. A. Potter, acting on behalf of the United States, that there should be transported by petitioner, according to the terms and upon the conditions of said contract, the aggregate amount of fourteen millions three hundred and eighty thousand five hundred and fifty-seven pounds of freight, (14,380,557 lbs.,) viz: From Fort Leavenworth, Kansas, to Fort Kearney, Nebraska, two million six hundred and fifteen thousand nine hundred and one pounds, (2,615,901 lbs.;) from Fort Leavenworth, Kansas, to Post Cottonwood, Nebraska, one million one hundred and seventy-six thousand *eight*
2 hundred and eighty-seven pounds, (1,176,687 lbs.;) from Fort Leavenworth to Denver, Colorado Territory, two millions eighty-five thousand one hundred and twenty-six pounds, (2,085,126 lbs.;) from Fort Leavenworth to Fort Sedgwick, Colorado Territory, one million two hundred and twenty-four thousand two hundred and seventy-one pounds, (1,224,271 lbs.;) Fort Leavenworth to Camp Collins, Colorado Territory, one hundred and ninety-one thousand eight hundred pounds, (191,800 lbs.;) Fort Leavenworth to Fort Halleck, D. T., one hundred and seventy-eight thousand and five hundred pounds, (178,500 lbs.;) from Fort Leavenworth to Fort Laramie, D. T., three millions four hundred ten thousand one hundred and ninety-six pounds, (3,410,196 lbs.;) from Fort Leavenworth to Fort Bridger, one hundred and ninety thousand five hundred and forty-*five* pounds, (190,544 lbs.,) and from Fort Leavenworth to Salt Lake, two millions nine hundred seventeen thousand eight hundred and thirty-two pounds, (2,917,832 lbs.) freight.

Petitioner further shows that immediately upon the execution of the said change and modification of said contract he provided himself with all the necessary means of transportation and all other requisites to carry out the same upon his part, and he avers that at all times during the existence of said contract he complied with all the stipulations on his part to be performed, and was ready and willing to transport all said freight which was agreed to be furnished petitioner for transportation by the officers of the United States.

Petitioner further shows, that in entering into the said contract he

assumed great responsibility and incurred heavy risks, relying upon the profits which he would make in transporting said freight at the prices agreed upon; that by the terms of said contracts as modified and changed, he became entitled to transport 14,380,537 pounds of freight from Fort Leavenworth, Kansas, to the posts and places hereinbefore designated.

That in violation of this contract, and of the rights of your petitioner under it, the officers in charge of the United States military depot at Fort Leavenworth, Kansas, on or about the 3rd day of August, A. D. 1865, refused to furnish petitioner for transportation of said stores the following, viz:

From Fort Leavenworth to Denver, C. T., 247,724 lbs.
From Fort Leavenworth to Fort Kearney, Nebraska, 1,018,736 lbs.
From Fort Leavenworth to Fort Laramie, D. T., 646,251 lbs.
From Fort Leavenworth to Salt Lake, 337,871 lbs.

3 Petitioner further shows, that if he had transported the said 2,250,582 pounds of freight under the terms of said contract, as he was entitled, and was prepared to do, he would have received therefor the sum of 292,419.58 dollars; that the necessary and reasonable expenses for the transportation of said freight would have been 231,555.37 dollars; that the difference between the sum which he would have been entitled to receive, and the reasonable expenses of performing the service, viz, 60,864.21 dollars, is the amount of damages which he has sustained by the said breach of the said contract by the United States.

Petitioner further shows, that in order to perform and carry out the said contract, petitioner associated with himself, when he submitted proposals for said service, Alexander Caldwell and L. T. Smith, of Leavenworth, Kansas, James Duffey, of Marietta, Pa., Thomas A. Scott, of Philadelphia, Pa., D. K. Jackman, Philadelphia, Pa., and James S. Reynolds, of Lancaster, Pa., all of whom were associated with petitioner when the said contract was signed, and when the same was modified and altered.

And petitioner shows, that by the terms of his agreement with the aforesaid persons, he will be required to pay to each of them a due proportion of the money which he may recover in this suit.

Your petitioner further shows that he and each of his said associates have at all times borne true allegiance to the Government of the United States, and that neither of them have in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. And he prays judgment of this honorable court for said sum of 60,864.21 dollars, and for such other and further relief as the nature of the case seems to demand.

HARVEY SPALDING,
Attorney for Claimant.

Harvey Spalding, being duly sworn, deposes that he is the attorney for the claimant; that no transfer or assignment of any part thereof, or any interest therein, has been made, except as in said petition is stated; that he (claimant) is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

HARVEY SPALDING.

Sworn and subscribed to before me this 11th day of July, 1870.

[SEAL.] EDM. F. BROWN,
Notary Public.

Claimant's solicitors—
C. F. PECK and HARVEY SPALDING,
Washington, D. C.

EXHIBIT A.

This agreement, made and entered into this 21st day of March, one thousand eight hundred and sixty-five, by and between Colonel J. A. Potter, quartermaster U. S. Army, on the authority and by the direction of the Secretary of War, and on behalf of the United States, of the first part, and Henry S. Bulkley, of the city and county of Leavenworth, in the State of Kansas, of the second part, for himself, his heirs, executors, and administrators, witnesseth:

That the said parties have covenanted and agreed, and by these presents covenant and agree, to and with each other as follows, viz:

ARTICLE I. That the said Henry S. Bulkley shall receive, at any time in any of the months from April to September, inclusive, during the year one thousand eight hundred and sixty-five, from the officers of the Quartermaster's Department at Forts Leavenworth and Riley, in Kansas, and Fort Laramie, in the Territory of Idaho, and any other points or places at which depots shall be established during the continuance of this contract on the west bank of the Missouri River, north of Fort Leavenworth and south of latitude 42 degrees north, all such military stores and supplies as may be offered or turned over to him for transportation, in good order and condition by the officer or agent of the Quartermaster's Department, at any or all of the above points or places, and transport the same with all practicable dispatch, and deliver them in like good order and condition to the officer or agent of the Quartermaster's Department on duty, or designated to receive them at any of the posts or depots which are now or may be hereafter established in the Territory of Colorado north of 40 degrees north, and in the Territories of Nebraska, Dakota, Idaho, Montana, and Utah, south of latitude 44 degrees north and east of longitude 114 degrees west of Greenwich, agreeably to the instructions they may receive from an officer or other authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies at Fort Leavenworth or other place of departure; and for the faithful performance of such service he shall be paid in the manner hereinafter provided for in Article XIV of this agreement, and at the rates specified and shown in the tabular statement hereto annexed and signed by the parties to this agreement, which statement is considered as part hereof.

ARTICLE II. That the said Henry S. Bulkley agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the posts or depots named in Article I, or from and to any other post or depot that may be established within the district named in said article, any number of pounds of military stores and supplies from and between one hundred thousand pounds and ten millions of pounds in the aggregate.

ARTICLE III. That the said Henry S. Bulkley agrees and binds himself to employ and have at Fort Laramie, Idaho Territory, a suitable person to act as his agent, to whom notice shall be given by the United States, through their officer or agent, of the stores which the said Henry

S. Bulkley will be required to transport from Fort Laramie, or of any change in the destination of said stores beyond said Fort Laramie; and that said agent shall conform to such directions and forward the stores to their new destination without unnecessary delay. For the stores to be forwarded from Forts Leavenworth and Riley, or from any other point of departure on the Missouri River, notice shall be given to the said Henry S. Bulkley, at his place of business or agency, in the vicinity of Fort Leavenworth, Kansas.

ARTICLE IV. In order that the said Henry S. Bulkley shall be in readiness to meet the demands and requirements made upon him for transportation, under this contract and agreement, due notice shall be given him or his agent of the quantity and kind of stores to be transported at any one time, at what points the stores will be ready for delivery to him, and the place of their destination, subject to such changes as may be decided upon while in transitu, as herein provided for, that is to say, for any quantity less than three hundred thousand pounds, twenty days' notice; for any quantity between three hundred thousand and six hundred thousand pounds, twenty-five days' notice; for any quantity between six hundred thousand pounds and one million pounds, forty days' notice; for any quantity between one million of pounds and two million five hundred thousand pounds, fifty days' notice; for any quantity between two million five hundred thousand pounds and five millions of pounds, sixty days' notice; for any quantity between five millions of pounds and ten millions of pounds, eighty days' notice: provided, however, that when stores are to be transported from Fort Laramie, except upon the arrival of a train or trains sufficient to transport such stores, or their having sufficient means of transportation at the post, an increase of ten per cent. upon the above-stated time of notice shall be given to the agent at that post.

ARTICLE V. The military stores and supplies, which shall be transported under this agreement, shall be conveyed to their respective destinations, and receipts shall be given by the officer of the Quartermaster's Department, serving at the place of consignment, for the full amount of stores that shall be delivered, and upon such receipts payment shall be made to the said Henry S. Bulkley, as hereinafter provided.

ARTICLE VI. That all the means of transportation to be used by the said Henry S. Bulkley, under this agreement, shall be submitted to the inspection of the officer or agent of the Quartermaster's Department at the place of departure, and only such shall be used as may be then and there accepted by him, provided that the said Henry S. Bulkley shall be authorized to employ mules or cattle, as he may elect.

ARTICLE VII. That to ensure the delivery of the stores and to aid the contractor in the execution of his agreement, certificates setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of its journey, shall be given by the officers or agents of the Quartermaster's Department, at the following points: For all trains starting under Article I of this agreement, from Fort Leavenworth or Riley, or any point on the Missouri River, at or below the town of Doniphan, at the crossing of the Big Blue River, Kansas, at Fort Kearney, at Fort Laramie, and at the crossing of the Sweet Water; for all trains, starting from points on the Missouri River, above the town of Doniphan, at some convenient point, about one hundred and twenty-five miles west of the point of departure, at Fort Kearney, at Fort Laramie, and at the crossing of the Sweet Water; for all trains starting from Fort Laramie for points beyond

it, at the crossing of the Sweet Water. Upon each certificate, so setting forth the good condition of the train, payment shall be made to the contractor for the service rendered to that point, and upon the arrival of the train at its place of destination or delivery, the officer or agent of the Quartermaster's Department, at the point of delivery, shall endorse the bill of lading in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered. Upon which indorsement payment shall be made, as per contract, deducting the amount of any payment or payments previously made and also the value of any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractor.

ARTICLE VIII. In all cases where stores have been transported by the said Henry S. Bulkley under this agreement, a board of survey shall be called without delay on their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in case of loss, deficiency, or damage, to investigate the facts and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of proper care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made on it. For loss of weight due to shrinkage, and for leakage of vinegar, molasses, or other liquids, the contractor shall not be held liable, if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage and leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficiencies or damages, the contractor shall pay the cost at the point he receives the articles, and freight shall be deducted in the latter case in proportion to the damages assessed. Should no board of survey be called, through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores, as specified in the bill of lading, in good order and condition, and he shall be paid accordingly. If the amount of loss, deficiency, or damages exceeds the value of the bill of lading, it shall be deducted from any of the payments that may become due. Transportation to be paid, in all cases, according to the actual distance travelled from the place of departure to that of delivery, the distance to be indorsed on the bill of lading by the officer or agent receiving the supplies.

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ARTICLE IX. That, in any case one or more of the trains of the said Henry S. Bulkley are stopped or delayed at any time or place exceeding two days, either under the orders of an officer of the Quartermaster's Department or the commanding officer of a post, or of troops present, or by any other act on the part of the Government or its agents, the contractor shall be paid upon a statement in writing procured from the officer or agent of the Government causing the delay, the sum of five dollars per diem for each and every team in the train for each and every day they may be so delayed; and in case the officer or agent of the Government aforesaid shall refuse to furnish such statement in writing, then the delay shall be paid for, as above, on the affidavits or other satisfactory evidence of credible and competent witnesses. All orders from officers or agents of the Government to halt trains shall be given to the contractor or his agents in writing, expressing fully the reasons therefor.

ARTICLE X. That the said Henry S. Bulkley shall be furnished with a suitable escort for the protection of the supplies, should he be required

to transport in any one train a less quantity than one hundred and twenty-five thousand pounds; but whenever required to transport one hundred and twenty-five thousand pounds or more, then no escort shall be furnished.

ARTICLE XI. That the said Henry S. Bulkley shall transport all the military stores and supplies for which the Quartermaster's Department may require transportation by contract on the route specified by this agreement, during the year one thousand eight hundred and sixty-five, provided the weight of such military stores and supplies shall not exceed in the aggregate ten millions of pounds; yet nothing herein shall be construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so.

ARTICLE XII. That, in case of failure, by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said Henry S. Bulkley, to be
9 in readiness to meet the demands and requirements made upon him for transportation, under this contract or agreement, after due notice shall have been given him or his agents, as provided for in Article IV of this agreement, then the officer or authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies shall have power to supply the deficiency, either by purchase, hire, or special contract, as the said officer or agent may elect, and the said Henry S. Bulkley will be charged with the difference of cost or expense thus incurred.

XIII. That in the event of a contractor's train transporting stores and supplies under Article I of this agreement, bound for points beyond Fort Laramie, being stopped by orders of the Government or any of its authorized agents at any point east of Fort Laramie, payment shall be made on the bill of lading for transportation to Fort Laramie, as if the train had been originally destined for that place, and all trains bound to Utah that may be stopped or diverted to other points beyond Fort Laramie, shall be paid only to the place of stoppage or to the new destination. It is further understood that, if at any time stores or supplies are required to be transported back to any point on the road or to any of the original points of departure included in this agreement, they shall be carried back at the same rate per hundred pounds per hundred miles, as provided for by said agreement for the month in which said stores were loaded.

ARTICLE XIV. For and in consideration of the faithful performance of the stipulations of this agreement, the said Henry S. Bulkley shall be paid at the office of the Quartermaster's Department at Fort Leavenworth, Kansas, according to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement, in the legal currency of the United States.

ARTICLE XV. It is expressly agreed and stipulated between the parties to this contract, that upon mutual agreement it may be changed, altered, modified, or abrogated, in whole or in part.

ARTICLE XVI. It is expressly understood that no member of Congress shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

10 In witness whereof, the undersigned have hereunto placed their hands and seals, at Fort Leavenworth, Kansas, the day and date above written.

(Signed) J. A. POTTER, *Col. & Q. M.* [SEAL.]
(Signed) HENRY S. BULKLEY. [SEAL.]

Witnesses:

(Signed) LAFAYETTE MILLS.
(Signed) W'M H. RUEL.

TABULAR STATEMENT.

Schedule of prices per one hundred (100) *pounds per one hundred* (100) *miles, to be paid Henry S. Bulkley, contractor for the transportation of military stores and supplies, under an agreement between Colonel J. A. Potter, quartermaster U. S. Army, acting on behalf of the United States, and the said Henry S. Bulkley, dated at Fort Leavenworth, Kansas, the 21st day of March*, 1865.

SCHEDULE OF PRICES.

Points of starting.	Periods of starting.					
	April.	May.	June.	July.	August.	Sept.
From and to points or places named in Art. I of above agreement.	$2 26	$2 26	$2 26	$2 26	$2 26	$2 26

(Signed) J. A. POTTER, *Col. & Q. M.*
(Signed) HENRY S. BULKLEY.

Witnesses:

(S'g'd) LAFAYETTE MILLS.
W'M H. RUEL.

11 In the United States Court of Claims. December term, A. D. 1869.

HENRY S. BULKLEY *vs.* THE UNITED STATES. } No. 6189.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of sixty thousand eight hundred and sixty-four dollars and twenty-one cents, the said defendants say that they are not indebted to the said claimant in the said sum of money nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney-General.

Filed Sept. 10, 1870.

12 In the Court of Claims.

HENRY S. BULKLEY
vs.
THE UNITED STATES. } 6189.

At a Court of Claims held at the Capitol in the city of Washington 29th of April, A. D. 1872, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants and do order, adjudge, and decree that the petition of the claimant be dismissed.

By the court.

13 In the United States Court of Claims.

HENRY S. BULKLEY
vs.
THE UNITED STATES. } 6189.

The petition of Henry Bulkley respectfully represents that he is informed and believes there is error to his prejudice in the judgment lately rendered against him in the above-named cause, from which he desires to appeal.

Wherefore he prays that an appeal may be allowed him in this case to the Supreme Court of the United States.

CHARLES F. PECK.
By T. J. D.
THOMAS J. DURANT,
For Petitioner.

Filed in the clerk's office May 1, 1872.

MAY 1, 1872.

Ordered, that the appeal be allowed as prayed for.

By the court.

14 *Henry S. Bulkley's case.*

In this case the court finds the facts to be as follows:

I. On the 21 March, 1865, defendants, by their quartermaster, Col. J. A. Potter, entered into the contract with the claimant annexed to & forming part of the petition.

II. At various times during the year 1865 the defendants by their quartermaster gave notices to the claimant, under Article IV of the contract, for the transportation of specific quantities of freights between certain specified points. And the claimant on his part prepared & was ready & willing to transport all of such freight & so notified the defendants' officers. But of the freights thus notified to the claimant, the defendants did not in fact need transportation for the following quantities & did not offer them to claimant:

From Fort Leavenworth to Fort Kearney	591,308 lbs.
From Fort Leavenworth to Laramie	643,725 "
From Fort Leavenworth to Denver	168,296 "
From Fort Leavenworth to Salt Lake	286,765 "

15 And these freights were withheld from the claimant and were not in fact transported by the defendants nor by any person on their behalf during the continuance of the claimant's contract.

And the Court of Claims upon the foregoing facts, as a conclusion of law, decides:

I. The defendants not having violated their contract through its entire scope, the claimant should not recover as damages the profits he would have made had the freights specified been furnished him. But the defendants having thrown upon the claimant needless expense, by requiring him to make ready for the transportation of freight under the contract which they did not in fact require to be transported, the claimant should recover the amount of such expense.

II. The claimant having failed to prove the amount of the said expense his petition should be dismissed.

By the court.

Filed April 29, 1872.

16 U. S. Court of Claims. December term, 1871.

HENRY S. BULKLEY } *vs.* THE UNITED STATES. } No. 6189.

Be it remembered that on this day of January, 1872, C. F. Peck, solicitor for the claimant, moves the honorable court to find specifically in this case the following facts, viz:

First. That the contract as set forth in the petition was entered into between the claimant and the defendant on the day and date set forth.

Second. That requisitions by defendant's agents were made upon claimant on and after March 21st, 1865, and prior to June 23rd, 1865, for transportation of military supplies within the route covered by said contract, of the aggregate amount of 10,000,000 pounds. That on June 24th, 1865, defendant's agent, Col. J. A. Potter, Q. M. at Fort Leavenworth, requested the claimant to transport, besides the maximum amount named in the original contract, viz: 10,000,000 pounds,

17 3,200,000 pounds of military supplies on said route, which request was in words and figures as follows, namely:

"DEPOT QUARTERMASTER'S OFFICE,
"*Fort Leavenworth, Kansas, June 4th*, 1865.

"H. S. BULKLEY, Esq.,
"*Fort Leavenworth, Kansas:*

"SIR: Transportation is required from his depot for military stores, as follows, viz: 1,700,000 pounds, to Salt Lake City; 1,500,000 pounds, to Fort Laramie.

"As you have already been notified of the full amount required to be transported under your present contract with the United States, you are requested to notify this office if you are prepared to transport this additional freight; and if so, please state within what time you can place the stores en route to their destination.

"Respectfully, your obedient servant,
(Signed) "J. A. POTTER,
"*Col. and Quartermaster.*"

That the claimant, on the 27th day of June, 1865, complied
18 with said request and agreed to such extension of the amount of supplies to be transported, in words and figures as follows, namely:

"LEAVENWORTH, KANSAS, *June* 27, 1865.

"Col. J. A. POTTER,
"*Quartermaster Fort Leavenworth:*

"SIR: Your favor of the 24th instant, requiring me to transport freight as therein stated, is received. In reply, would state that I will transport the stores upon the terms and conditions of my contract of March 21st, 1865, and that a large portion of them will be shipped within 15 days from date, and balance, as soon as practicable thereafter.

"Yours, respectfully,
(Signed) "HENRY S. BULKLEY."

Which terms were assented to by the defendant.

Third. That the claimant immediately following the new agreement of June 24th, 1865, prepared himself for a full performance of his original contract as modified on June 24th and 27th, 1865, and, of this the defendants had notice.

19 Fourth. That on or about Aug. 2nd, 1865, the claimant was prevented by defendants from transporting the following amount of supplies, which were a part of the 10,000,000 pounds for which requisitions were made upon the claimant prior to June 24th, 1865, viz:

	Lbs.
From Fort Leavenworth to Fort Kearney	591,308
" " " " Denver City	168,296

And also that in like manner and at the same time the claimant was prevented by defendant from transporting the following amount of supplies, which were included within the correspondence of June 24th, 1865, and June 27th, 1865, viz:

	Lbs.
From Fort Leavenworth to Fort Laramie	643,725
" " " " Salt Lake	286,765

Fifth. That the distance between the aforesaid posts are as follows, viz:

	Miles.
Fort Leavenworth to Fort Kearney	294
" " " Denver City	680
" " " Fort Laramie	667
" " " Salt Lake	1,206

Sixth. That the claimant was prepared to perform the transportation which he was prevented from performing by defendant's act, at a
20 cost of $1.90 per hundred pounds per hundred miles, which was the reasonable cost of performing the service.

Filed Feb'y 1, 1872.

Upon the foregoing prayer for findings of fact the court makes the following ruling, to wit:

The foregoing findings asked for by the claimant are refused, (except

so far as they may be included in the findings of the court,) as irrelevant and immaterial.

By the court.

21 United States Court of Claims. December term, 1871.

HENRY S. BULKLEY
vs.
THE UNITED STATES. } No. 6189.

And now comes the defendant, by the Attorney-General, and requests that the honorable court make finding of the following facts, viz:

1. That two vouchers for transportation of military stores on route No. 1, under the contract of March 21st, 1865, were given on May 19, 1866, and August 31, 1866, amounting to $39,374.81 and $24,859.65, respectively, to the claimant by Col. J. A. Potter, quar'master, and he receipted in full thereon.

2. That the Third Auditor certifies to the fact that these vouchers were the final payments on the contract of March 21st, 1865.

3. That these vouchers were given subsequent to the alleged
22 breach of contract set up by the claimant.

4. That no protest or any other claim not specified in these vouchers was made when the receipt in full was given.

5. That it was a final settlement on the contract of March 21st, 1865, a breach of which is alleged.

6. That the contract of March 21st, 1865, was for the transportation of ten millions of pounds.

7. That if any implied contract did exist, which is denied, it was for three millions two hundred thousand pounds.

8. That the amount actually transported by the claimant for the defendant was thirteen millions four hundred and forty-three thousand seven hundred and twenty pounds of supplies.

9. That after the making of the contract, and before its fulfillment, and on or about June 22nd, 1865, the claimant transferred an interest in said contract to one Harvey Spaulding.

23 10. That the contract marked Exhibit A was made, and the bond marked Exhibit B was given.

WILLIAM McMICHAEL,
Ass't Att'y-Gen'l.

EXHIBIT A.

It is hereby agreed, by and between Harvey Spalding, of Lawrence, K's, of the first part, and Alexander Caldwell, David K. Jackman, James Duffy, Thomas A. Scott, James L. Reynolds, and Leonard J. Smith, parties doing business under the firm-name of A. Caldwell & Co., of Leavenworth, Kansas, parties of the second part, as follows, namely:

The said party of the first part hereby agrees and bind himself, heirs, executors, and administrators, to transport in good order and condition, from Fort Leavenworth, K's, to Great Salt Lake City, Utah, seventy-five thousand pounds of such military stores as may be offered to or turned over to the said parties of the second part for transportation, by the depot quartermaster at Fort Leavenworth: Provided
24 always, and it is hereby agreed, by and between the said parties to this agreement, that if the said depot quartermaster shall fail to offer or turn over to the said parties of the second part the amount

of said stores, as above certified, or any part or portion thereof, for transportation, as above stated, the said parties of the second part shall not be bound to furnish to the said part' of the first part any other stores in lieu thereof.

And it is further agreed, by and between said parties, that the said party of the first part shall ship said stores on or before the 5th day of July, 1865, (provided the quartermaster shall deliver them to the parties of the second part by that time,) or as soon thereafter as they may be ready for shipment, and delivered to the parties of the second part, and shall transport the same with all practicable dispatch to their destination.

The said party of the first hereby assuming all the risks and obligations of H. S. Buckley, under his contract with the United States, dated March 21st, 1865, and of the parties of the second part in reference to the transportation and delivery of said stores at the point of des-
25 tination. For and in consideration of the faithful performance of this agreement by the said part' of the first part, the said parties of the second part agree to pay to the said part' of the first, at the rate of twenty-one dollars per 100 lbs., delivered at Salt Lake, payment to be made after the delivery of the stores and upon the return to the parties of the second of the bill of lading properly receipted by the officer or agent of the United States receiving the stores at the point of destination.

Witness our hands and seals this 22ond day of June, 1865.

(Signed) HARVEY SPALDING.
A. CALDWELL & CO.

Witness:
W. H. CARSON.

(Indorsed:) June 22, 1865. Freighter's contract. Harvey Spalding part' of the first part, in contract with A. Caldwell & Co., of Leavenworth, Kansas, parties of the second part. From Fort Leavenworth to Great Salt Lake City. 75,000 lbs.

(Copy.)

EXHIBIT B.

Know all men by these presents that we, Harvey Spalding,
26 Geo. W. Goss, & A. H. Hard, all of Douglass County, Kansas, and each of us, are held and firmly bound unto Alexander Caldwell, D. K. Jackman, James Duffy, Thomas A. Scott, James L. Reynolds, and Leonard T. Smith, parties doing business under the firm-name of A. Caldwell & Co., of Leavenworth, Kansas, in the sum of ten thousand dollars, good and lawful money of the United States, to be paid to the said Caldwell & Co., or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, and each and every of them, firmly by these presents, sealed with our seals, and dated this 22nd day of June, 1865.

Whereas Harvey Spalding has this day entered into an agreement with the said A. Caldwell & Co. for the transportation of military stores from Fort Leavenworth, Ks., to Salt Lake City, U. T., as therein expressed, which agreement is hereby referred to and made a part of this obligation as full as if the same was herein set out at large:

Now the condition of this obligation is such that if the said
27 Harvey Spalding shall faithfully perform and fulfill the obligations of said agreement entered into by him, as he has by said agree-

ment undertaken to do, then this obligation to be null and void; otherwise to remain in full force and virtue.

(S'g'd) HARVEY SPALDING. [SEAL.]
GEO. W. GOSS. [SEAL.]
A. H. HARD. [SEAL.]

Witness.

(Indorsed:) Bond. Harvey Spalding, Geo. W. Goss, A. H. Hard, to A. Caldwell & Co. June 22nd, 1865. Filed February 1, 1872.

Upon the foregoing prayer for findings of fact the court makes the following ruling, to wit:

The foregoing findings asked for by the defendants are refused (except so far as they may be included in the findings of the court) as irrelevant and immaterial.

By the court.

28 In the Court of Claims.

HENRY S. BULKLEY
vs.
THE UNITED STATES. } No. 6189.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for claimant for the allowance of an appeal, as filed in the clerk's office May 1st, 1872, and of the order of the court of May 1st, 1872, allowing the same; of the findings of fact and the conclusions of law thereon by the court, upon which it founded its judgment; and also the prayers for findings filed by the claimant and defendants, respectively, and the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this third day of May, A. D. 1872.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 382. Henry S. Bulkley, appellant, vs. The United States. Court of Claims. Filed 4th May, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 169.

HENRY S. BULKLEY, APPELLANT,

vs.

THE UNITED STATES.

RETURN TO RULE.

FILED DECEMBER 8, 1873.

1 Supreme Court of the United States.

HENRY S. BULKLEY, APPELLANT, *vs.* THE UNITED STATES. } No. 169. Appeal from the Court of Claims.

The appellant, Henry S. Bulkley, by his counsel, Thomas J. Durant, now comes and prays the court that an order be directed to the honorable the judges of the Court of Claims, requiring them to state whether or not certain facts were not proved on the trial in the court below, as set out in the notice hereunto annexed and marked Exhibit No. one.

THOMAS J. DURANT,
For Appellant.

EXHIBIT No. 1.

In the Supreme Court of the United States, October term, 1873.

HENRY S. BULKLEY *vs.* THE UNITED STATES. } No. 169.

To the Hon. judges of the U. S. Court of Claims:

2 You will please take notice that on Friday next, the 24th of October, 1873, we shall move the said Supreme Court for an order requiring you to make return with all convenient speed, and to find and certify to this hon. court, as matters of fact, in addition to the facts found and certified in said record:

First. Whether or not requisitions by defendant's agents were made upon claimant on and after March 21st, 1865, and prior to June 23, 1865, for transportation of military supplies within the route covered by said contract (of March 21, 1865,) of the aggregate amount of 10,000,000 pounds; that, whether or not on June 24th, 1865, defendant's agent, Col. J. A. Potter, Q. M. at Fort Leavenworth, requested the claimant to transport, besides the maximum amount named in the original contract, viz, 10,000,000 pounds, 3,200,000 pounds of military supplies on said route; which request was in words and figures as follows, namely:

3 "DEPOT QUARTERMASTER'S OFFICE,
"*Fort Leavenworth, Kansas, June* 4, 1865.

"H. S. BULKLEY, esq.,
"*Fort Leavenworth, Kansas:*

"SIR: Transportation is required from this depot for military stores, as follows, viz: 1,700,000 pounds to Salt Lake City; 1,500,000 pounds to Fort Laramie.

"As you have been already notified of the full amount required to be transported under your present contract with the United States, you are requested to notify this office if you are prepared to transport this additional freight; and if so, please state within what time you can place the stores en route to their destination.

"Respectfully, your obedient servant,
(Signed) "J. A. POTTER,
"*Col. and Quartermaster.*"

And whether or not the claimant, on the 27th of June, 1865, complied with said request and agreed to such extension of the amount of

4 supplies to be transported in words and figures as follows, namely:

"LEAVENWORTH, KANSAS, *June* 27, 1865.

"Col. J. A. POTTER,
"*Quartermaster, Fort Leavenworth:*

"SIR: Your favor of the 24th instant, requiring me to transport freight as therein stated, is received. In reply, would state that I will transport the stores upon the terms and conditions of my contract of March 21st, 1865, and that a large portion of them will be shipped within fifteen days from date, and balance as soon as practicable thereafter.

"Yours respectfully,
(Signed) "HENRY S. BULKLEY."

Which terms were assented to by the defendant.

Second. Whether or not on or about August 2nd, 1865, the claimant was prevented by defendants from transporting the following
5 amount of supplies, which were a part of the 10,000,000 pounds for which requisitions were made upon the claimant prior to June 24th, 1865, viz:

From Fort Leavenworth to Fort Kearney, 591,308 lbs.
" " " " Denver City, 168,296 lbs.

And also whether or not, in like manner and at the same time, the claimant was prevented by defendant from transporting the following amount of supplies, which were included within the correspondence of June 24th, 1865, and June 27th, 1865, viz:

From Fort Leavenworth to Fort Laramie, 643,725 lbs.
" " " " Salt Lake, 286,765 lbs.

Third. Whether or not the distances between the aforesaid posts are as follows, viz:

Fort Leavenworth to Fort Kearney, 294 miles.
" " " Denver City, 680 "
" " " Fort Laramie, 667 "
" " " Salt Lake, 1,206 "

Fourth. Whether or not the claimant was prepared to perform the transportation which he was prevented from performing by
6 defendant's act, at a cost of $1.90 per hundred pounds per hundred miles; and whether or not this was the reasonable cost of performing the service.

DURANT & HORNOR,
Att'ys for Claimant.

I hereby certify that I have, this 22d day of October, 1873, at or about eleven o'clock a. m., served a copy of the above on Chief Justice Ch's D. Drake, personally, in chambers of the Court of Claims at the Capitol.
Washington, D. C., 22d October, 1873.

J. EMILIEN TRUDEAU.

Supreme Court of the United States, October term, 1873.

HENRY S. BULKLEY, APPELLANT, } 169.
vs.
THE UNITED STATES. }

On consideration of the motion of Mr. T. J. Durant, in this cause,

for an order to be directed to the judges of the Court of Claims, requiring them to state whether or not certain facts were not proved on the trial in that court, and of the argument of the counsel thereupon had in support of the same: It is now here ordered by the court that said motion be, and the same is hereby, granted.

True copy. Test:

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

Supreme Court of the United States.

HENRY S. BULKLEY, APPELLANT,
vs.
THE UNITED STATES.

The chief justice and judges of the Court of Claims, in response to the order of the Supreme Court granted at this October term, 1873, requiring them to state whether or not certain facts were not proved on the trial of this case in the Court of Claims, respectfully make return:

That the facts thus inquired of were not found or determined by the Court of Claims upon the trial, and that, on the contrary, such facts so inquired of are identical with and in fact the same as the specific facts presented by the claimant upon the said trial, and which he then requested the Court of Claims to find, but which the Court of Claims refused to find and excluded from its consideration upon the ground that they were irrelevant and immaterial, as by reference to the record of this case, heretofore sent upon appeal, will appear.

And the undersigned, for the further information of the Supreme Court and the more clear understanding of the question, would respectfully state that on the trial of this case the claimant sought to recover certain profits which he had been prevented from making by the defendant's alleged breach of their contract upon which the suit is brought; but the Court of Claims decided, as matter of legal construction, that the defendants had not been guilty of such breach, nor prevented the claimant from making such profits. The court accordingly found only such facts as would enable the Supreme Court to decide whether its judgment upon the law was erroneous and excluded facts intended to prove the claimant's alleged damages; because, if there was no breach of the contract there could be no such damages recovered. But to preserve the legal rights of the claimant, and prevent any error prejudicial to him, the court made a formal ruling thereon to the effect that they were irrelevant and immaterial, as by reference to the record of appeal will more fully appear.

And the undersigned further return as to the facts embraced in the first and second sub-divisions of those now inquired of, that they were proved upon the trial of this case; and as to the remaining facts embraced in the third and fourth sub-divisions, that it cannot be intelligibly determined whether they were or were not proved without a rehearing of the case.

And the undersigned respectfully subjoin to this return a copy of the opinion of the Court of Claims hereinbefore referred to.

C. D. DRAKE.
CHARLES C. NOTT.
SAM. MILLIGAN.

12 United States Court of Claims.

HENRY S. BULKLEY
vs.
THE UNITED STATES.

NOTT, J., delivered the opinion of the court.

This is an action upon an Army transportation contract and the damages are laid at $60,864.21.

The contract was for the transportation of Army supplies upon the western plains, and the court must look to the object of the contract and the circumstances within which it was made, to construe it aright and ascertain the true intent of the parties.

The first article of the contract provides that the claimant "shall receive at any time," "from April till September," 1865, "all such military stores and supplies as may be offered or turned over to him for
13 transportation," "and transport the same with all practicable dispatch." The second article binds the claimant "to transport under this agreement" "any number of pounds of military stores and supplies from and between 100,000 and 10,000,000 in the aggregate." The eleventh article binds the defendants that the claimant "shall transport all the military stores and supplies for which the Quartermaster's Department may require transportation" "during the year 1865, provided the weight of such military stores and supplies shall not exceed in the aggregate 10,000,000 pounds," with a further proviso that the defendants may use their own means of transportation whenever deemed advisable.

The contract, therefore, was not an agreement for the transportation of 10,000,000 pounds or less of military stores; but was an agree-
14 ment for the transportation of "all the military stores and supplies for which the Quartermaster's Department may require transportation" during the year 1865, with a condition in favor of the claimant that he should not be required to carry less than 100,000 pounds, nor more than 10,000,000 pounds in the aggregate, and with a like condition in favor of the defendants, that they should not be bound to furnish him, of the stores they might need to transport, more than 10,000,000 pounds, nor any that they might prefer to convey by their own means of transportation.

Under this contract it was the right of the parties to waive, respectively, the conditions inserted for their protection. If, for example, the freight tendered to the claimant was but 50,000 pounds, and he carried it, the carriage would be a service under the contract subjecting him to all of its restrictions and responsibilities. Conversely, if the
15 freight tendered and conveyed exceeded 10,000,000 pounds the defendants were bound by all the other terms of their agreement. Whether the service rendered was for less than the minimum or more than the maximum it was still service rendered under the contract, so long as it related to "military stores and supplies, for which the Quartermaster's Department may require transportation" "during the year 1865."

So far it is apparent that the contract imposed no obligation upon the defendants to furnish any specific amount of freight, but only that for which the Quartermaster's Department might require transportation; and no breach could be alleged by the claimant, unless the freight contemplated was actually diverted from him, and given to another contractor. The object was not the transportation of 100,000 pounds

freight or more, nor of 10,000,000 pounds or less, but of "all the
16 military stores and supplies for which the Quartermaster's Department might require transportation" "during the year 1865," and the claimant participated in the risks growing out of the uncertainty of the amount as fully as the defendants. Grant's Case, (7 Wall, R., p. 331.)

But there is another provision in the contract: The fourth article provides that in order that the claimant "shall be in readiness to meet the demands and requirements made upon him for transportation under this agreement, due notice shall be given him or his agent of the quantity and kind of stores to be transported at any one time, at what points the stores will be ready for delivery to him, and the place of their destination;" and the contract then proceeds with great particularity and care to designate the length of the notices that shall be given for different quantities of freight to be carried.

17 It is therefore further apparent that, without this notice the claimant was not bound to take any step toward the fulfilling of his contract, while the giving of the notice threw upon him the obligation of being in readiness to transport the specified freight; provided, of course, that it came within the limitation of the contract. Undoubtedly the defendants could not give this notice wantonly, and be clear of all consequences. Undoubtedly their giving the notice threw upon them some reciprocal responsibility. Was that responsibility an obligation to furnish the freight notified of, irrespective of the requirements of the Quartermaster's Department, or to respond in damages for such needless loss as they may have cast upon the claimant. In other words, it is a simple question as to what should be the proper measure of damages.

The law contemplates in cases of contracts broken, two ele-
18 ments of damage: first, losses sustained, and second, gains prevented. (Griffin vs. Colvin, 16 N. Y. R., p. 494.) In this case it is manifest that there have been losses sustained. It is not so clear that there have been gains prevented.

If the parties had contracted for a specific amount the profits on that amount would have induced the acceptance of the claimant, and the parties would be held necessarily to have contemplated those profits as the measure of damages when they made the contract. But, as we have seen, they did not contract for a specific amount, but for such unknown amount as the uncertain exigencies of military affairs might require. In that uncertainty, within certain bounds, the claimant agreed to share.

The claimant was notified, pursuant to the terms of the contract, to transport certain specified quantities of freight between certain specified points. In one instance the quartermaster alluded by letter
19 to the fact that *that* 10,000,000 pounds of freight had already been transported, and requested the claimant to notify him "if he was prepared to transport this additional freight." In reply, the claimant notified the quartermaster of his willingness. In the other instances no special correspondence passed between the parties, but the notices were ordinary requisitions, made under the contract. In all instances the claimant made all needful preparations and held himself in readiness to perform. A part of the freight for each route was delivered and a part withheld. In fact, the necessity for sending the freight suddenly ceased, and the transportation thereof would have been needless and improper. Ought we to hold that, as between the contracting parties, the defendants were still bound to send it, and

that, to the claimant, "in contemplation of the parties when they
20 made the contract," which is the test the law imposes, there have been gains prevented when no freight was, in fact, transported, and none required?

It has been termed a "cardinal principle" that "the plaintiff must show himself to have sustained damage, or, in other words, that actual compensation will only be given for actual loss." (Sedgwick Mea. Dam., p. 223.) Here the claimant has sustained damage, and for that he should be compensated; but he should not recover an actual compensation for profits under the contract unless within the contemplation of the contract there was an actual loss of profits.

The rule which I think should govern the case may be thus stated: Where the defendants have violated their contract through its entire scope, so that the contractor has been deprived of profits which he might have made within the contemplation of the parties when they made the contract, there he should recover his gains prevented
21 as well as losses sustained. But where the defendants' breach relates to a minor matter in the contract, and has merely thrown upon the contractor needles' expense, there he should recover only the damage which he has actually sustained.

The evidence in this case shows clearly enough that the defendant's officers gave notices under the contract at various times, for the transportation of specified quantities of freight to four designated points, and that of the freight whereof the claimant was thus notified, there was withheld—

	Pounds.
From Leavenworth to Fort Kearney	591,308
From Leavenworth to Laramie	643,725
From Leavenworth to Denver	168,296
From Leavenworth to Salt Lake	286,765

It also appears that the claimant prepared and was ready to transport this freight, and that from being required to prepare to perform, he has suffered actual damages. But the case has been
22 tried upon the theory that the profits which might have been made, had the freight been furnished, constitute the true measure of damages, and therefore the actual losses sustained have not been shown.

The case will be remanded to the trial docket with leave to the parties to furnish evidence upon that specific point, viz, the amount of losses actually sustained by the claimant in accordance with the principle indicated by this opinion. Should however, the claimant prefer to stand upon the theory upon which the case was tried, and elect, within thirty days to carry it to the Supreme Court in its present form, the order now to be entered will be vacated and the findings of the court will be filed, and judgment entered dismissing the petitioner.

The order of the court is that the case be remanded to the trial
23 docket to remain there without further notice by the parties and with leave to either party to take testimony and furnish evidence as to the amount of the claimant's actual damages caused by the defendants in accordance with the opinion of the court.

(Endorsed:) Court of Claims. No. 169. Henry S. Bulkley, appellant, vs. The United States. Return to rule. Filed 8th December, 1873.

IN THE

Supreme Court of the United States.

October Term, 1873.

HENRY S. BULKLEY
vs.
THE UNITED STATES.

No. 169.

On Appeal from the Court of Claims.

Brief for Plaintiff and Appellant.

Plaintiff sues for damages for an alleged violation of a contract made by him for transportation of Government stores.

This contract was made between petitioner and Col. J. A. Potter, acting on behalf of the United States, and was a supplemental and independent agreement to an original contract between the same parties. The original contract was made 21st March, 1865; the supplemental contract on the 27th June, 1865, by the acceptance by the plaintiff of the proposal made by the proper officer of the United States. The original contract is set forth on Record, p. 3; the supplemental contract on Record, p. 9, *et seq.*

The gravamen of plaintiff's action, as set forth in his petition, (Rec., p. 1, *et seq.*,) is the recovery of damages for the violation of this supplemental contract, the original contract having been fully performed by all parties thereto, to their mutual satisfaction, except as to the two items from Fort Leavenworth to Fort Kearney, 591,308 lbs.; from Fort Leavenworth to Denver, 168,296 lbs., which items were included in the ten million pounds specified in the original contract, notices for the transportation of which had been given by the United States prior to June 24, 1865.

The Court of Claims, however, ignored the supplemental contract in their findings of the facts, considering it as irrelevant and immaterial, (Rec., p. 11 ;) found only the original contract of 21st March, 1865 ; farther found "that under article " 4 of this contract, defendants, by their Quartermaster, *gave* " *notices to the claimant for the transportation of specific* " *quantities of freights between certain specific points.* And " the claimant, on his part, prepared, and was ready and will- " ing to transport all of such freight, and so notified the de- " fendant's officers. But of the freights thus notified to the " claimant, the defendants did not, in fact, *need* transporta- " tion for the following quantities, and *did not offer them* to " claimant:

" From Fort Leavenworth to Fort Kearney.....591,308 lbs.
" From Fort Leavenworth to Laramie.....643,725 "
" From Fort Leavenworth to Denver.....168,296 "
" From Fort Leavenworth to Salt Lake.....286,765 "

" And these freights were *withheld* from the claimant, and " *were not in fact transported* by the defendants nor by any " person on their behalf during *the continuance of claimant's* " *contract.*

" And the Court of Claims upon the foregoing facts, as a " conclusion of law, decides:

" 1st. The defendants *not having violated their contract* " *through its entire scope*, the claimant should not recover as " damages the profits he would have made had the freight " specified been furnished him. But the defendants having " thrown upon the claimant needless expense, by requiring " him to make ready for the transportation of freight under " the contract which they did not in fact require to be trans- " ported, the claimant should recover the amount of such ex- " pense.

" 2d. The claimant having failed to prove the amount of " said expense, his petition should be dismissed."

Record, pp. 8, 9.

There is a full report of the case, with the opinion of the Court of Claims and the dissenting opinion of Judge Loring, in 7 Nott and H. Rep., 543–551.

The claimant appealed.

ASSIGNMENT OF ERRORS.

1st. The lower court erred in not ruling this case as a contract between individuals.

2d. The lower court erred in its measure of damages.

3d. And in not awarding plaintiff the full amount claimed in his petition.

ARGUMENT.

If this were the case of a violation of an ordinary contract

of charter party between individuals, the defendants would be liable for the whole amount of the freight.

French Code de Commerce, article 288.
Bradley *vs.* Denton, 3 Wis., 557.
Sedgwick on Damages, p. 404, ed. 1869.
Flanders on Shipping, p. 494, ed. 1853.
Kleine *vs.* Catara, 2 Gallis. R., 61.

And where profits arise immediately out of the contract, they are allowed as damages. "They are part and parcel of "the contract itself, entering into and constituting a portion "of its very elements; something stipulated for, the right to "the enjoyment of which is just as clear and plain as to the "enjoyment of any other stipulation."

Masterton *vs.* Mayor of Brooklyn, 7 Hill, 62.
United States *vs.* Speed, 8 Wall., 77.
Rail R. Company *vs.* Howard, 13 Howard, 307.
Hoy *vs.* Grenoble, 10 Casey, 10.

The authorities are innumerable.

Sedgwick on Damages, 76, ed. 1869.

This plain and well-recognized principle of law should govern this case. The general rule, under all systems of jurisprudence, is that the damages due to the creditor for breach of contract, when its object is anything but the payment of money, are the amount of loss he has sustained and the profit of which he has been deprived.

See L. C., 1928. Code Napoleon, 1149.

The distinction drawn by the lower court does not exist in law. Its opinion admits the general principle above enun-

ciated; "losses sustained, gains prevented;" but restricts its application to a violation of a contract *through its entire scope*. This is a grave error.

"Damages and interest are due for every non-performance, "(inexecution,) whether partial or total; that is to say, for "non-performance properly so called, and for incomplete non-"performance. In the incomplete or partial non-perform-"ance is embraced the tardy performance; for he who exe-"cutes later than he ought to do does not execute all that he "should; *minùs solvit qui tardiùs solvit.*"

4 Marcadé on Art., 1145, C. N.
See also Sedgwick on Damages, p. 234, ed. 1869, on "*Part-performance.*"

The entirety of a contract alludes to and regards the entirety of its consideration. "Contract entire, consideration "entire." The test is, "*the consideration to be paid, not the* "*thing to be performed.*" (16 Smith, (Pa.,)351, Oil Co. *vs.* Brewer.) An entire contract corresponds nearly with the *indivisible obligation* of the civil law.

6 Casey, 200, Logan *vs.* Caffrey.

But there is no question of an indivisible obligation here. The contract or agreement between the plaintiff and the Government is, by the very findings of the lower court, clearly divisible; and no intentional allusion to the entirety of a contract is made when it is said, "The defendants not having "violated their contract through its entire scope," &c.

"Where the agreement embraces a number of distinct sub-"jects which admit of being separately executed and closed, "it must be taken distributively, each subject being consid-"ered as forming the matter of a separate agreement after it "is so closed."

Perkins *vs.* Hart, 11 Wheat., 251.

The effort is to interpose the judicial power to shield the Government from a violation of its own contract. The plain rule of law requires the allowance to plaintiff of his profits as damages. The inapplicability of this principle to the case in hand is placed upon the ground that "defendants have not "violated their contract through its entire scope." This is nothing more nor less than the introduction of "EQUITABLE "CONSIDERATIONS" into the jurisprudence of the Court of Claim, which is directly and wisely prohibited. If this Court of Claims has jurisdiction over *legal* rights and obligations only, and cannot judge of the equities between a citizen and his Government, when they are urged by the citizen; still more palpably must the defect of jurisdiction be, when the equities are urged by the irresistible force of the Government, in its own court, and whilst defending its own case.

Bonner *vs.* United States, 9 Wall., 156.
Meade *vs.* United States, 9 Wall., 691.

"The principle rests upon a solid foundation of reason and "justice. It regards the sanctity of contracts. It requires "parties to do what they have agreed to do. If unexpected "impediments lie in the way, and a loss must ensue, it leaves "the loss where the contract places it. If the parties have "made no provision for a dispensation, the rule of law gives "none. It does not allow a contract fairly made to be an-"nulled, and it does not permit to be interpolated what the "parties themselves have not stipulated."

Dermott *vs.* Jones, 2 Wall., 8.

There is nothing whatever in the contract to justify the interpretation put upon it by the lower court. The damage is

admitted to have occurred; the claimant has suffered loss and been prevented from gain; and the Court awards the former and denies the latter, because the profits were not contemplated by the contract, and "the defendants' breach relates "*to a minor matter in the contract*, and has *merely thrown* "*upon the contractor needless expense*."

To say that claimant had no profits in contemplation when he entered into the contract, or that the United States regarded their contractor as actuated by no motive but an enthusiastic love of country, would border on the domain of romance more closely than on that of law. Both parties contemplated profits. The contract specified profits as included in the price of transportation. As between individuals there cannot be a doubt that for a similar violation of a contract of affreightment profits would be awarded as a part of the damages.

See the authorities quoted at beginning of argument.

And here a part was delivered and a part withheld of the freight for each route.

See Duffie *vs.* Hayes, 15 Johns, 327.

But it is said "the defendants' breach relates to a minor "matter in the contract, and has merely thrown upon the "contractor needless expense;" therefore "he should recover "only the damage which he has actually sustained."

See opinion, 7 C. Clms, p. 549.

Here again we are disturbed by distinctions which have no legal existence. The violation of a contract "*through its* "*entire scope*" is, as we have shown, not the only case in which the party injured is allowed his "gains prevented."

What are *the major* and what are *the minor matters* in a contract like the one under consideration we are at an entire loss to understand.

The thing to be carried is as much of the essence of a contract to carry or transport as a thing is of the essence of a contract of sale; without it there is either no contract at all, or a contract of another description. Now, in the contract under consideration the number of pounds to be transported is within certain limits, (100,000 pounds and 10,000,000 pounds in the aggregate—article II, Rec. 3,) optional with defendants, until they give due notice "of the quantity and "kind of stores to be transported at any one time," &c., &c.

Article 4 of contract, Rec., p. 4.

After notice given, the number of pounds to be transported is matter of strict contract and binding on both parties. Article XII shows how the Government is to proceed in case of a total or partial failure of claimant to perform, and with what damages *he* is chargeable.

Rec., p. 6.

These articles conclude the parties. After notice given neither party could withdraw and escape damages. The measure of damage is fixed and immutable by the contract in case of claimant's partial or total default. So it must be in case of defendants' default, either total or partial; not by the contract, for it is silent on this subject, but by the law, which tacitly inheres therein.

These views are much better and more briefly set forth in Judge Loring's dissenting opinion in this case.

7 C. Clms., 550.

Indeed, the only question to be decided is as to the measure of damages.

Shall it be a mere indemnity?

Or shall it be for losses sustained and gains prevented?

We have shown the latter to be the general rule, and it is admitted by the lower court. If the present case be an exception to the general rule and claimant must be satisfied with a mere indemnity, the *onus probandi* is on the defence to bring the case within the operation of the exception.

See 1 Greenleaf on Ev., sec. 261*a*, and cases there cited.

And what is the fact alleged and proved by defendants, to withdraw this case from the operation of the general rule? "The defendants did not in fact need the transportation for "the following quantities and did not offer them to the claim- "ant; these freights were withheld from the claimant, and "were not in fact transported by the defendants nor by any "person in their behalf during the continuance of the claim- "ant's contract."

"In fact, the necessity for sending the freight suddenly "ceased, and the transportation thereof would have been "needless and improper."

It is quite clear that a private person urging so frivolous an excuse as this for the non-performance of his contract would fail in his defence; and we cannot establish any different rule for the Government than for individuals.

Nor is this a case for mere *indemnity*. So far as possible, damages must be alleged and proved; in some cases they are rigorously determined by law, as, *e. g.*, damages for nonpayment of money, and then no discretion is allowed to the judge. In other cases—and the present case is embraced in this category—some discretion is necessarily vested in the court. *Indemnity* is not the rule here; because there was FAULT on the

part of defendants, and none on the part of claimant. We are entitled to *compensation*, not only for *losses sustained*, but for *gains prevented*, as all the cases cited conclusively show. The measure of damages in such cases having been settled both on reason and authority, the attempt to establish a new one in a suit *against the Government by an individual* must fail necessarily. We have already a proper standard in United States *vs.* Speed, (8 Wall., 77,) and "we must take this de-"cision as a matter of faith, not of reason, until the case is "overruled by the tribunal that made it. But it coincides "with our reason as well as our faith." (Meyer *vs.* Illig, 2 Sm., (Pa.,) 444.) *Stare decisis et non quieta movere.*

See Hadley *vs.* Baxendale, 26 L. and Eq., 398.
Roper *vs.* Johnson, L. R. 8 C. P., 137–181.

Respectfully submitted.

DURANT & HORNOR,
for Bulkley.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

HENRY S. BULKLEY, APPELLANT,
vs.
THE UNITED STATES.
} No. 169.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

HENRY S. BULKLEY, APPELLANT,
vs.
THE UNITED STATES. } No. 169.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

The petition in this case is founded upon a contract made on the 21st of March, 1865, between Colonel Potter, quartermaster in the Army, and the claimant, whereby the claimant was to receive, at any time, in any of the months from April to September, inclusive, during the year 1865, from officers of the Quartermaster's Department, at Forts Leavenworth and Riley, and Fort Laramie, and any other points or places at which depots shall be established during the continuance of the contract on the west bank of the Missouri River, all such military stores and supplies as may be offered or turned over to him for transportation, in good order and condition, by the officer or agent of the Quartermaster's Department, at any or all of the above points or places, and transport the same with all practicable dispatch, and deliver them in like good order and condition to the officer or agent of the Quartermaster's Department on

duty, or designated to receive them, at any of the posts or depots which are now or may be hereafter established in the Territory of Colorado, &c., agreeably to instructions from the Quartermaster's Department. The claimant was to transport any amount of pounds of military stores and supplies from and between one hundred thousand pounds and ten millions of pounds in the aggregate.

It was further provided, in order that Bulkley shall be in readiness to meet the demands and requirements made upon him for transportation under this contract and agreement, that due notice shall be given to him of the quantity and kind of stores to be transported at any one time, at what points the stores will be ready for delivery to him, and the place of their destination.

By the eleventh article of the agreement it was provided that the claimant "shall transport all the military stores and supplies for which the Quartermaster's Department may require transportation by contract on the route specified by this agreement, during the year 1865, provided the weight of such military stores and supplies shall not exceed in the aggregate ten millions of pounds; yet nothing herein shall be construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so."

The contract is printed in full in the record, pp. 3–6.

At various times during the year 1865, the defendants, by their quartermaster, gave notices to the claimant for the transportation of specific quantities of supplies between certain specified points; and the claimant on his part prepared and was ready and willing to transport all of such supplies, and so notified the defendants' officers. But of the supplies of which notice was thus given to the claimant, the Government did not in fact need transportation for certain quantities, and did not offer them to the claimant. And they were not in fact transported by the defendants nor by any person on their behalf during the continuance of the claimant's contract.

Upon these facts, the Court of Claims decided as follows:

"I. The defendants not having violated their contract through its entire scope, the claimant should not recover as damages the profits he would have made had the freights specified been furnished him. But the defendants having thrown upon the claimant needless expense, by requiring him to make ready for the transportation of freight under the contract, which they did not in fact require to be transported, the claimant should recover the amount of such expense.

"II. The claimant having failed to prove the amount of the said expense his petition should be dismissed."

The claimant appealed.

ARGUMENT.

The decision was sufficiently favorable to the claimant. There is nothing in the contract by which the Government can be considered as having guaranteed to the claimant that he should carry all the supplies for which they notified him to get ready. It is expressly provided that he shall receive all such stores and supplies as the Quartermaster's Department may need transportation for during the period. Where the Government put him to any expense to be ready to transport supplies, and afterward found that they did not require transportation for the entire amount for which notice was given, it was but just and equitable that the claimant should be compensated for any loss that he may have incurred in consequence of this notice. But clearly the contract does not entitle him to claim the profit that he might have made by transporting the same.

Of course the burden of the proof was upon the claimant to show what damage he received, and as he has failed to show that he has suffered any, his petition was properly dismissed.

C. H. HILL,
Assistant Attorney-General.